

83BMCASC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

5 04 Cr. 664 (TPG)

6 CESAR CASTRO,

7 Defendant.

8 New York, N.Y.  
9 March 11, 2008  
10 2:40 p.m.

11 Before:

12 HON. THOMAS P. GRIESA,

13 District Judge

14 APPEARANCES

15 MICHAEL J. GARCIA

16 United States Attorney for the  
Southern District of New York

17 LOYAAN EGAL

18 Assistant United States Attorney

19 DON BUCHWALD

20 Attorney for Defendant

21 ALSO PRESENT: SMYLA JONES, Probation  
22 GEOFFREY STEELE, Probation  
23 MIRTA HESS, Spanish Interpreter



83BMCASC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

S1 04 Cr. 664 (TPG)

5 CESAR CASTRO,

6 Defendant.  
-----x

7  
8 New York, N.Y.  
9 March 11, 2008  
10 2:40 p.m.

11 Before:

12 HON. THOMAS P. GRIESA,

13 District Judge

14 APPEARANCES

15 MICHAEL J. GARCIA  
16 United States Attorney for the  
Southern District of New York  
17 LOYAAN EGAL  
Assistant United States Attorney

18 DON BUCHWALD  
Attorney for Defendant

19  
20  
21 ALSO PRESENT: SMYLA JONES, Probation  
22 GEOFFREY STEELE, Probation  
23 MIRTA HESS, Spanish Interpreter

83BMCASC

1 (Case called)

2 THE COURT: Thank you for coming. Are you the CJA?

3 MR. BUCHWALD: I am today CJA attorney, your Honor and  
4 your chambers called and asked if I could be of assistance with  
5 respect to the issue of proceeding on the basis of the present  
6 presentence report.

7 When the interview of Mr. Castro by the probation  
8 department was conducted outside of the defense attorney's  
9 presence, my understanding from the probation officers are that  
10 they have not been able to reach Mr. Moran, who is Mr. Castro's  
11 counsel of record, and the question was whether Mr. Castro  
12 would be willing to proceed on the basis of the presentence  
13 report as it is, and I have discussed that with him, your  
14 Honor.

15 THE COURT: Thank you for coming. It's been a very  
16 odd circumstance. We just can't seem to get Mr. Moran into  
17 functioning. But can the assistant just summarize for the  
18 record what has happened from your standpoint.

19 MR. EGAL: Yes, your Honor. Loyaan Egal on behalf of  
20 the United States. At counsel's table is probation officer  
21 Smyla Jones and supervisor Geoffrey Steele, your Honor, both  
22 from the probation office.

23 As your Honor is aware, the last time we were before  
24 your Honor with regards to this defendant, Mr. Moran was not  
25 available, but I believe he called in by telephone and he sent

83BMCASC

1 a letter explaining that an interview was conducted by  
2 probation outside of his presence and --

3 THE COURT: Mr. Moran had sent a letter.

4 MR. EGAL: Correct, Mr. Moran sent a letter.

5 THE COURT: Complaining about that.

6 MR. EGAL: Correct. Then we had a conference where  
7 Mr. Moran called in on the phone and he was by telephone  
8 conference. And the rest of us were present, meaning the  
9 defendant, myself, your Honor. And your Honor granted him his  
10 request that probation conduct the interview while he was  
11 present. Again, probation has had problems since that  
12 conference, your Honor, getting in contact with Mr. Moran or  
13 not getting in contact but actually having Mr. Moran present  
14 while an interview would be conducted. I would like for  
15 probation to put on the record for your Honor the instances  
16 that they have had or the issues they have had gaining contact  
17 with Mr. Moran.

18 THE COURT: Please do. That would be very helpful.

19 MS. JONES: After your Honor ordered the defendant to  
20 be reinterviewed with Mr. Moran present, Mr. Moran and I set an  
21 interview date for February 14, 2008, which he cancelled the  
22 night before, saying that he had a court appearance or  
23 scheduling problem. We subsequently made another attempt and  
24 we scheduled an interview for February 26, 2008, which  
25 Mr. Moran again cancelled the night before. So we set a final

83BMCASC

1 interview date of March 3, 2008 -- I'm sorry -- March 4, 2008,  
2 which Mr. Moran left a message the night before saying that he  
3 was going to waive his right to be at the presentence  
4 interview. That's pretty much how it's been going.

5 MR. EGAL: If I may just add, your Honor, I was told  
6 that probation, the interviews prior to when Mr. Moran -- the  
7 interviews that Mr. Moran was writing his letter about where  
8 the interview was conducted with the defendant, from reading  
9 the PSR as it's drafted, it appears that the probation officer  
10 did not ask the defendant any questions about the offense.

11 THE COURT: About the what?

12 MR. EGAL: About the offense, the instant offense,  
13 that whatever information has been put in the PSR goes to the  
14 background of the defendant in the PSR. I just wanted that to  
15 be clear.

16 THE COURT: What about the hearing or the conference  
17 today? Mr. Moran was notified. Mr. Beale, make you can help  
18 us out.

19 THE DEPUTY CLERK: I telephoned Mr. Moran twice in  
20 reference to today's conference and left messages advising him  
21 of the day, the time, the nature of the conferences, asking him  
22 to call back to confirm. He never called back.

23 THE COURT: And he's not here.

24 THE DEPUTY CLERK: That is correct.

25 THE COURT: It was scheduled for, I think, 11

83BMCASC

1 something this morning.

2 THE DEPUTY CLERK: 11:30.

3 THE COURT: 11:30. And he did not come at 11:30,  
4 right?

5 THE DEPUTY CLERK: That is correct.

6 THE COURT: We rescheduled it at 2:30 so we could have  
7 the assistant of the CJA attorney, and that we are grateful to  
8 Mr. Buchwald.

9 I think Mr. Moran is retained counsel.

10 MR. EGAL: I believe that's correct, your Honor.

11 THE COURT: Do you have any ideas, Mr. Buchwald?

12 MR. BUCHWALD: I do, your Honor. Let me say I've had  
13 a chance to speak to Mr. Castro and there are a couple of  
14 things we'd like to bring to your Honor's attention.

15 First, with respect to the particular issue today of  
16 proceeding with the presentence report as is, I have discussed  
17 with Mr. Castro the fact that the case involves a mandatory  
18 minimum sentence of ten years, that the sentencing guidelines  
19 calculation in the report is 121 months to 151 months, that the  
20 probation department itself in the final presentence report has  
21 recommended to your Honor the 121-month sentence. That's at  
22 the bottom of the guidelines and explained to him various  
23 things pertaining to the federal sentencing process and further  
24 discussed with him that there appears to be nothing in the  
25 interview that pertains to the offense itself.

83BMCASC

1                   Under those circumstances, I believe that Mr. Castro  
2 is prepared to confirm that there would be nothing served by an  
3 additional interview. But that having been said, it is also  
4 clear to me that Mr. Castro has had extraordinary difficulty,  
5 as the Court has and the probation department has, in being  
6 able to reach Mr. Moran and communicate with Mr. Moran; and,  
7 among other things, that Mr. Castro himself has never received  
8 a copy of the presentence report. It wasn't sent to him by  
9 Mr. Moran or left with him or mailed to him.

10                  And so we request the following, that a sentencing  
11 date be set sufficiently down the line from now so that  
12 Mr. Castro himself can read the presentence report and digest  
13 it. He says he believes he would be able to read it, though  
14 it's in English, although he has it and is able to do it slowly  
15 on his own; that Mr. Castro has asked that his family be given  
16 an opportunity to try to retain another lawyer whose name he  
17 has provided to me, one Norman Trabush. He is hopeful that  
18 his mother would be able to finance the retention of another  
19 lawyer through a loan on her home.

20                  And it would seem to me, if Mr. Castro is given the  
21 opportunity in the first instance to try to retain another  
22 lawyer and his sentencing is pushed back far enough so, A, he  
23 has that opportunity and, B, he can review the presentence  
24 report himself, that any prejudice would be obviated.

25                  With respect to the specific issue here, I think he

83BMCASC

1 understands that his problem is a problem of the sentencing --  
2 the mandatory minimum and the guidelines as opposed to what is  
3 in the presentence report. The presentence report itself,  
4 except insofar as it states the offense as viewed by the  
5 government and as apparently set forth at the trial, is not  
6 something that particularly impacts the sentence that the  
7 probation department has recommended, recommended at the very  
8 bottom of the guidelines and everybody being in the situation  
9 of having a mandatory minimum.

10 We would request on his behalf that he be permitted to  
11 retain a copy of the presentence report -- during the interim  
12 we had made a Xerox -- if your Honor does authorize us to give  
13 it to him so he does have it himself and so that he be given an  
14 opportunity through his family to retain another attorney.

15 MR. EGAL: Yes, your Honor. I just want to say, the  
16 government obviously has no objection to Mr. Castro finding an  
17 attorney. The only concern the government puts forth for your  
18 Honor to consider is that depending on how long it takes for  
19 the defendant to determine if he will be able to retain an  
20 attorney, whoever comes on this case, the government will be  
21 asking for obstruction points based on what came when the  
22 defendant took the stand, and I would assume whoever came on  
23 this case and represented him for sentencing would want to go  
24 through the trial transcript and see what it is that the  
25 government's argument is as to why it's going to ask your Honor

83BMCASC

1 for obstruction based on the testimony.

2 THE COURT: That would take it above the 120 months.

3 MR. EGAL: Yes, your Honor. I believe it's a  
4 two-point enhancement for obstruction points in the guidelines,  
5 so it would raise it as far as the guideline calculation a  
6 couple of points. But I would assume whoever came on the case  
7 would want to read the trial transcript to see that.

8 THE COURT: What do the two points do as far as time?

9 MR. EGAL: Your Honor, it raises it to an offense  
10 level of 34 with a criminal history of I. Unfortunately, I do  
11 not have the guidelines calculations.

12 THE COURT: I have got the guidelines.

13 MR. BUCHWALD: 151 to 188, your Honor.

14 THE COURT: What is the offense?

15 MR. EGAL: The offense that he was convicted of, your  
16 Honor?

17 THE COURT: Right.

18 MR. EGAL: It's 21 841(b)(1)(A), which is the  
19 mandatory minimum of ten years.

20 THE COURT: What is it, drugs?

21 MR. EGAL: Yes, for heroin conspiracy, your Honor.

22 THE COURT: What's the offense level now without the  
23 enhancement?

24 MR. EGAL: With acceptance of responsibility -- I'm  
25 sorry. There is no acceptance. It's offense level 32,

83 BMCASC

criminal history I. Obviously, I misspoke .

THE COURT: Obstruction of justice, what would that --

MR. EGAL: That would be a two-level enhancement, which would make it offense level 34, criminal history I.

THE COURT: That makes a big difference.

MR. EGAL: Yes, your Honor.

THE COURT: The thing is, whatever issues there are, there has to be proper representation of Mr. Castro in connection with the sentence. And certainly he has a right to seek a new lawyer.

I don't like to criticize Mr. Moran in his absence, but unless there is some explanation by him, he has been -- he has not properly represented Mr. Castro in connection with the sentence and the proceedings relating to that, so I would adjourn the sentence. What do you recommend as to --

MR. EGAL: That's all I was saying, your Honor, as far as the length because if Mr. Castro is not able to retain this attorney that he's asking about, there are quality attorneys, such as Mr. Buchwald, on the CJA panel that would do a more than adequate job in representing him at sentencing. So I'm asking your Honor for a time frame.

MR. BUCHWALD: Mr. Castro's understanding is that Mr. Trabush is on trial.

THE COURT: Mr. Who?

MR. BUCHWALD: The proposed new attorney who his

83BMCASC

1 family is going to see is on trial and has promised to come to  
2 see Mr. Castro as soon as that trial is completed. Mr. Castro  
3 believes that it's a relatively short trial but really doesn't  
4 know specifically, and believes that a decision would be made  
5 as soon as Mr. Trabush comes to see him and speaks to him,  
6 which would be right after that trial is concluded.

7 THE COURT: I'll take your recommendation. If we have  
8 to adjourn it, we can do that, but let's set some date and do  
9 the best we can now. What do you recommend?

10 MR. EGAL: Your Honor, the government would recommend  
11 a month, your Honor.

12 THE COURT: It's Mr. Buchwald who made the  
13 application. Let's hear from him.

14 MR. BUCHWALD: I would think that that would be a fair  
15 time to adjourn it for one month. I would think if a new  
16 attorney comes in at that point, that attorney may ask for some  
17 additional time. Alternatively, if there is no new attorney,  
18 your Honor would probably consider the appointment of the CJA  
19 attorney at that point, but it seems to me that the one month  
20 should be adequate to determine whether this new attorney will  
21 be available and will actually come in.

22 THE COURT: First things first. We will adjourn it  
23 for a month. What's the date, Mr. Beale?

24 THE DEPUTY CLERK: Thursday, April 17, at 4:30.

25 THE COURT: Now, before we get into the question of a

83BMCASC

1 new attorney, there is now an attorney. I don't want to do  
2 anything that rushes Mr. Castro into a decision that might be  
3 improvident. But from what has been said here, I take it that  
4 Mr. Moran is being discharged. I haven't literally heard that.  
5 And so I'm not sure that that is the case. What are you  
6 saying?

7 MR. BUCHWALD: I would not recommend that Mr. Moran be  
8 discharged yet.

9 THE COURT: Mr. Moran is not yet discharged, but  
10 Mr. Castro has the right to discharge him and there are no  
11 particular formalities. He can write him a note, he can call  
12 him. But if he is discharged, then the U.S. Attorney, the  
13 assistant, and I have to know it. And until he's discharged,  
14 he's still the lawyer. Now, Mr. Castro and his family have a  
15 right to continue with Mr. Moran as long as Mr. Moran doesn't  
16 obstruct the proceedings and the Court, which he really hasn't  
17 been doing.

18 MR. BUCHWALD: Your Honor, if I might, Mr. Moran, I  
19 take it, is a New Jersey attorney, whom I assume is either  
20 admitted in New York or has appeared pro hac vice. I believe  
21 until discharge he is totally subject to the authority of the  
22 Court and it would seem to me appropriate for the Court to  
23 order his appearance 30 days hence in any event, because we  
24 just don't know what's about to happen. Maybe he will be  
25 replaced at that point by new counsel or that new counsel will

83BMCASC

1 have appeared even before then or that CJA counsel would be  
2 appointed on that date, but in either event, it would seem to  
3 me to be appropriate to order his appearance.

4 THE COURT: I would amend that. I would say that I am  
5 going to issue an order and I'll have Mr. Beale phone that to  
6 him, and that is that he appear in this courtroom one week from  
7 now.

8 Mr. Beale, what time?

9 THE DEPUTY CLERK: It will be Thursday, March 20, at  
10 4:30.

11 MR. EGAL: Your Honor, the assistant, myself, I will  
12 not be in the office that week, but I can have someone --

13 THE COURT: All I'm doing is having him come in and I  
14 am going to say this, that if he does not come in at that time,  
15 unless I hear an objection right now, he is discharged from the  
16 case, and I think Mr. Castro is nodding affirmatively. You  
17 agree with that, do you? Yes.

18 If he communicates with the Court and he says he's got  
19 another engagement, obviously, we can handle that, but if he  
20 simply doesn't appear and doesn't offer any reasonable  
21 adjourned date and I mean reasonably close, he is discharged.  
22 Now, if he comes in, we will see what he says. And then we  
23 will see what Mr. Castro wants to do. And if he wants to  
24 discharge Mr. Moran and get another lawyer, he and his mother  
25 are free to do that. They are free to do that at any time.

83BMCASC

1                   If Mr. Castro wants to discharge Mr. Moran, regardless  
2                   of this direction that he comes in next week, Mr. Castro can  
3                   discharge Mr. Moran at any time. You understand what I'm  
4                   saying, don't you? But the weekday is simply so we don't have  
5                   things open. If Mr. Moran is discharged, he will come in and  
6                   find out he's discharged. If he isn't, we will take it from  
7                   there. We want to set another date, and that is a month from  
8                   now, to follow up on what happens in the meantime.

9 What's the date a month from now, Mr. Beale?

10 THE DEPUTY CLERK: April 17.

11 MR. EGAL: At 4:30?

12 THE DEPUTY CLERK: 4:30, yes.

16 THE COURT: That's fine. And then the probation  
17 people will be here.

18 Mr. Buchwald, thanks a million.

19 MR. BUCHWALD: Thank you very much, your Honor.

20 THE COURT: I think that's all we can do today.

21 MR. BUCHWALD: With the Court's permission I am going  
22 to show the presentence report to him so the client can read  
23 it.

○○○